No. 2527

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JUNG QUEY alias SAM KEE, LI CHEUNG, MON HING and JT YEE,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFFS IN ERROR.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals, for the Ninth Circuit:

Plaintiffs in error respectfully petition that the decision of this court herein be set aside and that a rehearing of the cause be granted.

The ground of this application is that the participation of the Government officials in the case has not received adequate consideration at the hands of the court. This subject-matter is discussed in the opinion as follows:

"An instruction requested by the defendants to be given to the jury and which the Court refused, to which an exception was taken and is here assigned as error is as follows:

'I instruct you that if you find from the evidence that the quartermaster Matthai took any opium prepared for smoking purposes from the steamship China on January 30th, 1914, while she was in the port of San Francisco, and that he did so with the permission of the Government, through its duly authorized officers, then I instruct you that such opium was not being unlawfully transported after its importation, and the receipt of such opium by any person thereafter, by any person, from said quartermaster, was not an unlawful act, and therefore cannot be considered by you as an unlawful act done in pursuance of the conspiracy, as alleged in the indictment, and such testimony cannot be considered by you as establishing in any degree the guilt of any of the defendants of the conspiracy as alleged in the indictment.'

The correctness of the ruling of the trial court in respect to that matter may be sufficiently shown by a reference to the case of *Grimm v. United States*, 156 U. S. 604, where a post-office inspector, Robert W. McAfee, sent through the post-office certain letters to fictitious persons."

The court proceeds to quote from the opinion in the *Grimm* case. This decision stands for the doctrine more definitely stated in the recent *Woo Wai* case, that the commission of a crime is not deprived of its unlawful character by reason of the fact that the Government officers have knowingly consented or even participated therein, provided, how-

ever, that they have not induced the original guilty purpose.

The case at bar presents a different question entirely. We are not concerned here with the law of entrapment; the refused instruction does not go to that subject at all. On the contrary, it presents the issue whether under the facts here it was possible to commit the crime charged.

The material parts of the statute are:

> "That if any person * * * shall receive, conceal, buy, sell, or in any manner facilitate the importation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law * * *"

The crime thus involves an act or conspiracy to act after importation of opium. And in order that the crime may be committed the accused must know that the opium has been brought into the United States contrary to law.

The second count of the indictment, upon which the defendants were convicted,—there was an acquittal on the first—assumes the crime of importation to have been successfully committed and that upon its spoils a second conspiracy was conceived and consummated. Such a condition manifestly never existed. The seven skins or bladders of smoking opium were never unlawfully in the country and to the following demonstration of that fact, we respectfully draw the attention of the court.

The officers of the Government were informed of the presence of the opium on board the S. S. China and thereafter authorized and effected its entrance into the United States. (Trans. of Rec. p. 33.) Captain Head, with the assistance of other customs officers, directed the movements of Matthai, Kirchisen and the opium. (See Test. of Williams. [Trans. of Rec. 44, 45, 46], Test. of Joseph Head [Trans. of Rec. 48 to 52 inc.], Test. of Kirchisen [Trans. of Rec. p. 62, middle paragraph], Test. of Harrison [Trans. of Rec. 68 to 72 inc.].) Kirchisen was also an agent for the Government. See his own testimony and the testimony of Head. (Ref. supra.)

When by authority of Captain Head, the opium came over the side of the China and passed the gang plank, it was met by Inspector Williams, inspected, stamped with the mark of his approval and permitted to enter. We quote what the inspector said:

> "I am inspector of customs, and was such on January 30th of this year. I know Quartermaster Matthai. I remember on or about January 30th of this year his having passed down the gang plank with a suitcase. I put my mark on it. The suitcase now shown to me is the one with my mark on it. I had instructions to let him pass with the suitcase. I looked at the contents of the suitcase, and it had opium in it; it was in skins, and it was smoking opium and was in the kind of skins which you show me now. * * * They told me it was opium, and I understood it was to be passed. The bladders were in the suitcase as they appear here today, and the bladders here in this suitcase shown to me look

like those that were in the suitcase when I passed the suitcase. I concluded that it was opium. My mark on it was 'W' with a cross through it. The mark I put on the suitcase indicated that I *as a custom inspector,* had inspected the contents and had passed it as being permitted to land so that a man coming along with mark on it would pass anybody at the gate; that was the effect of this mark that I put on the suitcase. So far as I was concerned, or anybody at the gate at the pier was concerned, Matthai might have taken it anywhere, and not be subjected to any further inspection. Matthai and Kirchisen went ashore together at that time. I had never seen them before I saw them at the gangplank. I was told to pass to German quartermasters."

(Trans. of Rec. 44 to 46 inc.)

Harrison, another customs inspector, saw the opium come off the ship and saw the skins at 3rd and Townsend streets where he took them to the Olympia Hotel and then turned them into the Government's property room for the night. He then took the opium to the Olympia Hotel, and after the defendants were arrested, turned it over to the seizure clerk (Trans. of Rec. pp. 68 to 71 inc. Direct exam.). Captain Head also had actual possession of the opium for some time. It was turned over to him by Harrison and kept by him overnight and until the following afternoon (Trans. of Rec. p. 49).

No part of that shipment of opium unlawfully entered the United States. Actual contraband within the country was a necessary element. That ele-

ment was lacking and no conspiracy could be, or was accomplished.

A situation not nearly so plain as that at bar is presented in cases where a pretended accomplice in the alleged crime of burglary or larceny has communicated the apparently unlawful purpose to the owner of the property, who thereupon permits it to be taken while the informer participates in the proceeding. In these cases it has been held that no crime is committed for the reason that the owner consents and through a representative actually participates in the act and that the unlawful intent alone does not render the act criminal. The reasoning upon which this conclusion is based is somewhat refined. It is not nearly so convincing as in the case at bar, because here we are concerned with a statutory offense comprising certain elements; under the proof one of these is entirely wanting. However, we cite the line of authorities just discussed because of the analogy presented thereby.

In *People v. Collins,* 53 Cal. 185, it was held:

> "Parnell informed the Sheriff that Collins had requested him to enter a house in the night time, and steal therefrom a sum of money which he knew to be concealed there, the money to be divided between them. By advice of the Sheriff, Parnell agreed to do so, for the purpose of entrapping Collins, and accordingly entered the house, secured the money, marked it so that it could be identified, and after delivering it to Collins gave a signal, when the Sheriff arrested Collins with the money in his possession. *Held,* that, inas-

> much as Parnell alone entered the building, and did so without felonious intent, there was no burglary committed, and therefore Collins could not have been privy to a burglary" (Syllabus).

In *People v. Clough,* 59 Cal. 438, the same question was again considered. While the court sustained the conviction because the facts did not bear out this theory of defense, it stated in its opinion, in which Circuit Judge Ross, then a member of the state court, concurred:

> "It is claimed that one Ulter was associated with the defendant in the taking of the property, and that there was an understanding between Gage (the party alleged to have been robbed) and Ulter, that Gage should meet Ulter and the defendant at an appointed time and place and go through the form of being robbed by the defendant. *If the evidence supported this theory, it would result, that the act did not constitute the crime charged.* 'Robbing is the felonious taking of personal property in the possession of another, from his person and against his will, accomplished by force or fear'."

In *Allen v. State,* 40 Ala. 334 (91 Am. Dec. 477), it was held:

> "Where defendant proposes to a servant that they rob the office of the latter's employer, and the servant communicates this fact to his employer, who informs the police, and where the employer, acting under the advice of the police, furnishes the servant with a key to his office, by means of which, at an appointed night, the servant unlocks the office door, and together with the defendant enters the room, where they

are arrested, the defendant is not guilty of burglary'' (Syllabus).

In *Williams v. State,* 55 Ga. 391, it was held:

> "If one pretending by way of artifice to be an accomplice but believed by the accused to be a real accomplice, performs, at the instance of the owner of the goods, acts amounting to the physical constituents of larceny, the pretended accomplice represents the owner and not the accused, although the accused may have concurred in the acts and thought he prompted them, and therefore for them the accused cannot be held guilty.''

In *Love v. People,* 160 Ill. 501, it was held:

> "The indictment for burglarizing Hoag's office, under which this defendant was convicted, rests on this evidence. One does not escape the convictions that Robinson entered that office with Hoag's consent. If Robinson entered the building with Hoag's consent, and took the money with no intent of stealing it, but in pursuance of a previously arranged plan between him and Hoag, intending solely to entrap the defendant into the apparent commission of a crime, it is clear that no burglary was committed; there being no felonious intent on the part of Robinson in entering the building or taking the money. If no burglary was committed by Robinson, because of an absence of a felonious intent, the defendant could not have been an accomplice and privy to a burglary.''

In cases of this character courts often confuse the principle just presented with the doctrine of entrapment. They are, however, distinct. The activity of the owner of the property may be so reprehensible that public policy will not sanction a conviction of

the apparent offender. The same result may follow from the conduct of the Government officials, as in the *Woo Wai* case. But irrespective of this factor, the effect of the participation of the customs officers here was to legalize the importation of the opium and thereby to make it impossible in fact to commit the crime charged. That the plaintiffs in error did not know these things is, of course, immaterial; one cannot be a criminal by imagination; guilty intent alone does not constitute crime.

In view of the foregoing it is submitted that the decision of this court upholding the trial judge in refusing to give the requested instruction should be reconsidered.

THE INSTRUCTION CONCERNING THE TESTIMONY OF ACCOMPLICES CONSTITUTED ERROR.

The trial court left it to the jury to determine whether Matthai and Kirchisen were acting for the Government and solely to secure evidence, or on the other hand were guilty participants in the crime (Trans. p. 102). This, of course, did not remedy or affect in any way the error committed in refusing the instruction discussed above. On the contrary, it made essential an instruction upon the subject of the testimony of accomplices and thereby paved the way for another prejudicial error. The court charged:

> "The testimony of accomplices is, however, always to be received with caution, and weighed and scrutinized with great care. And the jury

> should not rely upon it unsupported, unless it produces in their minds the most positive conviction of the truth. It is just and proper in such cases for the jury to seek for corroborating facts and circumstances in other material respects; but this is not absolutely essential, provided the testimony of such witnesses produces in the minds of the jury full and complete conviction of its truth."
>
> (Trans. p. 102.)

The court refused to give the following instruction:

> "A conviction cannot be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense, as set forth in the indictment; and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof."
>
> (Trans. pp. 108-9.)

In so ruling, the trial judge undoubtedly relied upon the practice in some circuits where the common law upon the subject in hand obtains. He was guided, no doubt, by the impression which seems to prevail that this is a matter of settled federal procedure. Such, however, is not the case. The law of evidence in criminal cases as administered in the federal courts is the law of the particular state in which the trial court is sitting as established there at the time when the state was admitted into the Union. As a general proposition this is subject to qualification where a statute has been enacted by Congress

upon the subject, but since there is no federal statute concerning the testimony of accomplices, the general rule will obtain here.

The earliest case presenting this question is *U. S. v. Reid,* 12 How. 361. That case arose in Virginia. It was held that the law by which the admissibility of testimony in criminal cases must be determined, was the law of that state as it was when the courts of the United States were established there by the Judiciary Act of 1789.

This decision was cited and applied in a case arising in Colorado, which was admitted into the Union long subsequent to the Act of 1789—*Withaup v. U. S.,* 127 Fed. 530. Mr. Justice Van Devanter, then a member of the Circuit Court of Appeals for the 8th Circuit, wrote the following opinion:

> "The territory embraced in the State of Colorado had not been acquired by the United States in 1789 or 1790, and was not admitted into the Union as a state until 1876. So there are here no known and established local rules in force in 1789 or 1790 which could have been contemplated by Congress when the judiciary and crimes acts were passed. When, however, Colorado was admitted into the Union as a state, it had known and established rules concerning evidence in criminal cases. An act of the territory of Colorado passed November 5, 1861, and in force at the time of the state's admission, declared the rules of evidence of the common law to be binding on all courts and juries in criminal cases, save in some respects not here material. Laws Colo. 1861, p. 335, Sec. 145; Gen. Laws Colo. 1877, Sec. 821. The acts of Congress under which the state was admitted made it a judicial district, established courts of the United States

therein, and clothed them with criminal jurisdiction. To enable them to administer the criminal laws of the United States, it was essential that there should be some certain and established rules of evidence. Congress made no provision upon the subject, other than to declare that 'the laws of the United States not locally inapplicable shall have the same force and effect within the said state as elsewhere within the United States.' Act June 26, 1876, c. 147, Sec. 1, 19 Stat. 61 (U. S. Comp. St. 1901, p. 328). It is not material that there are here no known and established local rules in force in 1789 or 1790 which could have been contemplated by Congress when the judiciary and crimes acts were passed, for there was no purpose at that time, and could have been none, to make those acts operative in what is now the State of Colorado. But it is material that Colorado had known and established rules upon the subject at the time when those acts were subsequently fully extended to the new state, and given the same operation there which had been given to them in Virginia and other states at the time of their enactment. The situation incident to the admission of Colorado as a state, and the manner in which Congress dealt with it, were essentially the same as those shown in United States v. Reid, supra. Applying the principles of that decision, it is obvious that it was the purpose of Congress, save where it had legislated otherwise, or should do so in the future, to refer the courts of the United States in the new state to the known and established rules concerning evidence in criminal cases, which were in force in Colorado at the time when the judiciary and crimes acts were given the same operation in that state as in other states, which was when Colorado was admitted into the Union as a state. No law of the state enacted thereafter changing the rules of evi-

> dence can affect criminal trials in the courts of the United States. Such was, in effect, the decision of the Supreme Court in Logan v. United States, 144 U. S. 263, 298, 303, 12 Sup. Ct. 617, 36 L. Ed. 429, which presented a similar question in respect of the State of Texas." (pp. 533-4.)

The same principle was announced in *United States v. Van Luven,* 65 Fed. 78, where the testimony of accomplices was involved. The court held:

> "At the common law, as the same existed in England, in the progress and development of that law the conclusion was reached by the judges charged with the duty of presiding over trials of criminal cases that it was unwise for a jury to convict a person upon the uncorroborated testimony of an accomplice, and therefore judges cautioned the juries in this particular, and charged them that it was unwise for the jury to convict upon the uncorroborated testimony of an accomplice. In the State of Iowa it has been enacted as a provision of statutory law that no person shall be convicted of a crime upon the uncorroborated testimony of an accomplice, but there must be corroborative testimony tending to connect the defendant with the commission of the offense. I have always deemed it my duty as a judge of a court of the United States, and trying cases arising in the state of Iowa, and where the defendant is a citizen of this state, to say to the jury that they cannot convict upon the uncorroborated testimony of an accomplice; and when a case stands before a jury on that kind of evidence alone I assume the duty of charging them to return a verdict of not guilty, but, if the testimony of an accomplice is accompanied by evidence tending

> to corroborate the same in its material statements, then it is the duty of the court to submit the whole to the jury, and it is for the jury to determine whether the corroborating evidence is of such a character and weight as justifies the jury in giving weight to the testimony of the accomplice" (p. 81).

The law of California at the time when that state was admitted into the Union (September 9, 1850), is found in the Statutes of 1849-50, Chap. 119, Section 405, page 304:

> "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to convict the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense, or the circumstances thereof."

This was the substance of the requested instruction. In refusing it and in charging according to the common law, the trial judge committed prejudicial error.

Dated, San Francisco,
May 29, 1915.

Respectfully submitted,

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Catlin, Catlin & Friedman,
Attorneys for Plaintiffs in Error and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiffs in error and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

J. C. CAMPBELL,
Of Counsel for Plaintiffs in Error and Petitioners.